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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEIL HARTIGAN ~~TYRONE C. FAHNER~~, ATTORNEY GENERAL OF ILLINOIS, CHARLES P. ZALAR, STATE'S ATTORNEY OF GRUNDY COUNTY, and PHILIP GUSTAFSON, DIRECTOR OF THE ILLINOIS DEPARTMENT OF NUCLEAR SAFETY,

Petitioners.

v.

GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

In December, 1980, Illinois enacted a statute ("the Spent Fuel Statute") which prohibited the importation of spent nuclear fuel generated outside the state of Illinois if that fuel was to be stored at an away-from-reactor facility located within Illinois. General Electric Company ("General Electric")* operates such a storage facility at Morris, Illinois. Together with Southern California Edison Company ("SCE"),** which had a contract to store spent fuel at Morris, General Electric brought suit against the state officials charged with enforcing the Statute, seeking a declaratory judgment that it was unconstitutional.

Both the District Court and the Seventh Circuit Court of Appeals held the Spent Fuel Statute unconstitutional under the Commerce Clause, relying on this Court's decision in *City of Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978), striking down a virtually identical statute. The only question properly presented to this Court is whether that determination was erroneous.***

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* Pursuant to Sup. Ct. Rule 28, General Electric states that it has no parent companies. A list of its subsidiaries (except wholly-owned subsidiaries) and affiliates is attached hereto as Exhibit A.

** Pursuant to Sup. Ct. Rule 28, SCE states that it has no parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates.

*** The first question presented by the Petition relating to the economic impact of the Statute was neither raised nor passed upon by the courts below and thus is not properly before this Court.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

General Electric's facility at Morris, Illinois, is the only operating commercial facility in the United States licensed by the United States Nuclear Regulatory Commission ("NRC") to accept and store spent nuclear fuel away from the site of the power plant where it was discharged. While the Morris facility provides an important service for those utilities that need to store fuel off-site, it has sufficient capacity to store only 750 tons of spent fuel, a small fraction of the 64,912 tons projected to be

discharged nationwide through the year 2000.[1] At the time the complaint was filed, 316 tons of spent fuel were stored at Morris, approximately 171 tons of which had been discharged from reactors located outside the state of Illinois. Of these 171 tons, 95 came from SCE's nuclear generating facility in San Onofre, California. When the Spent Fuel Statute was enacted into law, SCE had a contract to transport an additional 32 tons to Morris for storage during 1981 and 1982.

On December 3, 1980, the Illinois General Assembly enacted the Spent Fuel Statute, Ill. Rev. Stat. ch. 111½, §§ 230.21-.24 (1981), into law over the Governor's veto. As enacted, the law provides:

> "No person may dispose of, store, or accept any spent nuclear fuel which was used in any power generating facility located outside this State, or transport into this State for disposal or storage any spent nuclear fuel which was used in any power generating facility located outside this State, unless the state of origin of such spent nuclear fuel has a facility, which is not part of a power generating facility, for the disposal or storage of spent nuclear fuel substantially like that of this State and has entered into a reciprocity agreement with this State."

Because Morris is the only licensed and operating away-from-reactor facility in the country, the reciprocity provisions of the Statute are meaningless. The Spent Fuel Statute was

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[1] The capacity of the Morris plant is pleaded in the complaint, ¶ 11. The projection of nationwide discharges is taken from the United States Department of Energy's June, 1982 publication, "Spent Fuel Storage Requirements," DOE/RL-82-1. Only 3 per cent of the spent fuel discharged in the United States to date is presently stored at Morris. Even if its full capacity is utilized by the year 2000, only 1½ per cent of the nation's spent fuel will be stored there. Under these circumstances, there is clearly no factual basis for the fears expressed in the Petition that a failure to reverse the Court of Appeals' decision would make Illinois (and specifically Morris) the "dumping ground" for the nation's nuclear wastes and cast upon Illinois the "entire burden of nuclear waste disposal." See Petition at 6, 8.

designed to and in fact did prohibit General Electric from accepting spent nuclear fuel discharged anywhere outside the state of Illinois for storage at its Morris facility.

General Electric and SCE brought this action on December 24, 1980, seeking a declaratory judgment that the Spent Fuel Act was unconstitutional because, among other things, it placed an impermissible burden on interstate commerce in violation of the Commerce Clause and intruded into an area preempted by pervasive federal regulation in violation of the Supremacy Clause.[2] In defending the Statute against this attack, the State argued in both the District Court and the Court of Appeals, as it does here, that the Statute established a valid quarantine, and therefore did not violate the Commerce Clause. On the preemption issue, however, the State took a completely different approach than it is now taking. Nowhere in any of the numerous briefs or pleadings below did the State contend that the Statute was prompted by concern over the possibility that the Morris facility might be abandoned and that the state might be required to bear the cost of maintaining the site. Rather, the State argued that the Statute was an attempt to regulate radioactive emissions from spent fuel, which it contended was permissible under the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat 685.

Both the District Court and Court of Appeals rejected these arguments. In his opinion for the Seventh Circuit, Judge Posner first affirmed the District Court's holding that the Statute was not an attempt to quarantine spent fuel and thus

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[2] A few hours after this complaint was filed in federal court, the State filed what purported to be an enforcement action against SCE in state court, later joining General Electric as a defendant. General Electric and SCE removed that action, which was consolidated with the federal case. On appeal, the Seventh Circuit held that the removal had been improper and ordered the case remanded to state court. General Electric and SCE have not sought review in this Court of that determination.

could not escape the consequences under the Commerce Clause of its facial discrimination against goods originating outside the state. Then, although recognizing that it "may seem superfluous" to consider the preemption issue, Judge Posner went on to reject the State's arguments on that point as well.[3]

REASONS FOR DENYING THE WRIT

The Illinois Spent Fuel Act is indistinguishable from the New Jersey statute this Court held unconstitutional under the Commerce Clause in *City of Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978). The State attempts to distinguish this case by characterizing the Statute as a quarantine measure designed to prevent the transportation of dangerous materials. Both lower courts, however, rejected this argument, noting that the Statute by its terms permits transportation of spent fuel within or through Illinois so long as out-of-state fuel does not come to rest within Illinois at an away-from-reactor site. There is no basis for disturbing this factual determination.

Because the lower courts were clearly correct on the Commerce Clause issue, there is no need for this Court to consider the preemption issue. However, even if the Court were required to review that issue, it cannot do so on the grounds suggested by the State in its Petition, which were not raised in the courts below.

The Petition argues that there is a "direct" conflict between the Seventh Circuit's decision in this case and the Ninth

[3] In his opinion, Judge Posner noted that the Statute, which prohibits storage of certain types of fuels rather than setting emission levels for those fuels, clearly was not designed to control radioactive air pollution. Thus, the Clean Air Act was irrelevant and the Spent Fuel Statute fell squarely within the Atomic Energy Act's preemption of state regulation of radiological hazards. See *Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143 (8th Cir. 1971), *aff'd*, 405 U. S. 1035 (1972).

Circuit's decision in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 659 F. 2d 903 (1981), on which this Court has granted certiorari, 102 S. Ct. 2956 (1982). The "conflict," however, is purely an after-the-fact invention by the Petitioner. In *Pacific Gas & Electric*, the Ninth Circuit was dealing with a state moratorium on nuclear power plants that was claimed to be based solely on economic considerations; because the court found that this provision had been "enacted for purposes other than protection against radiation hazards," it held that it was not preempted by federal regulation.[4] By contrast, until it reached this Court, the State had always characterized Illinois' Spent Fuel Statute as a radioactive pollution control measure. The Seventh Circuit's decision that the State's attempt to regulate spent fuel as a radiological hazard was preempted is entirely consistent with the Ninth Circuit's ruling.

The State's "discovery" of an economic motivation behind the Spent Fuel Act comes too late to be considered by this Court. The courts below were not given an opportunity to consider the argument, and there is no factual basis in the record for the State's assertion that the importation of spent nuclear fuel into Illinois for storage at the Morris plant poses a threat to the Illinois treasury.

Furthermore, under the State's own reasoning, if it prevails on the Commerce Clause argument, it must lose on the preemption issue, and if it prevails on the preemption issue, the Statute must be unconstitutional under the Commerce Clause. For, if the statute is a quarantine measure aimed at radioactive emissions, it is preempted, and if it is merely an economic regulation, it does not fall within the quarantine exception and thus is void under the Commerce Clause.

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[4] Section 274(k) of the Atomic Energy Act provides that the Act shall not be construed to affect the states' authority "to regulate activities for purposes *other than* protection against radiation hazards." 42 U. S. C. § 2021(k) (emphasis supplied).

Finally, the State argues that if the Atomic Energy Act preempts the Spent Fuel Statute, then the Act is an unconstitutional invasion of the State's right under the Tenth Amendment to control its own treasury. This argument also was not raised below and therefore cannot be considered here. In any event, any Tenth Amendment argument is clearly foreclosed by this Court's decision in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U. S. 264 (1981). Accordingly, the petition for certiorari should be denied.

I.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE SPENT FUEL STATUTE UNCONSTITUTIONALLY DISCRIMINATES AGAINST ARTICLES IN INTERSTATE COMMERCE SOLELY ON THE BASIS OF THEIR ORIGIN.

The Spent Fuel Statute on its face precludes the storage in Illinois of spent nuclear fuel *only* if that fuel was used in power plants located outside of the State. Similarly, the Statute prohibits the transportation into Illinois for storage of such nuclear fuel *only* if that fuel was used in power plants located outside of the State.[5] No restrictions whatsoever are imposed upon spent fuel discharged from plants located *within* Illinois.

[5] As noted above, General Electric's facility at Morris, Illinois is the only operating commercial facility in the United States licensed by the NRC to accept spent fuel for away-from-reactor storage. Therefore, even though the statute purports to allow the importation of spent fuel from other states if they grant reciprocal storage privileges, in practice, the Statute imposes a complete ban on the importation for storage purposes of spent fuel discharged outside the State of Illinois. However, even if some states could extend reciprocal storage privileges to Illinois, the statute would still be invalid. In *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U. S. 366 (1976), this Court made it clear that one state may not blackmail others into signing reciprocity agreements by refusing to accept their goods if they do not. See also *Sporhase* v. *Nebraska*, 50 U.S.L.W. 5115, 5119-5120 (U. S. 1982).

In holding this Statute unconstitutional, the courts below correctly found that it imposed an impermissible burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

A.

This Case Is Controlled By The Decision In *City Of Philadelphia* v. *New Jersey.*

Where a state statute regulates domestic and interstate activities evenhandedly and imposes only an incidental burden on interstate commerce, it will be upheld "unless the burden . . . is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). However, where the statute on its face discriminates against articles of commerce based solely on their out-of-state origin, this Court has applied the strictest scrutiny, approaching a "virtually *per se* rule of invalidity." *City of Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978); *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 36, (1980); *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979).

The case at bar clearly falls within the latter category and, indeed, is virtually on all fours with *City of Philadelphia* v. *New Jersey*. In that case, the Court struck down a 1974 New Jersey statute that prohibited the importation for disposal purposes of most types of "solid or liquid waste which originated or was collected outside the territorial limits of the State." 437 U. S. at 618. The New Jersey Supreme Court had upheld the statute against a Commerce Clause challenge on the ground that the importation of wastes that by definition could not be put to effective use was not "commerce" within the meaning of the Commerce Clause.

On appeal, this Court reversed. It rejected the New Jersey court's restrictive definition of "commerce," stating that "[a]ll

objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset. . . . Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement." *Id.* at 622-23.

After making the threshold determination that Commerce Clause principles applied to this material, the Court described the "crucial inquiry" as whether the statute

> " . . . is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."

Id. at 624. In resolving the issue, the Court stated that it was irrelevant whether the legislative motivation had been economic protectionism or a desire to protect the public health:

> "But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."

Id. at 626-27.

The Court noted that there was no basis for distinguishing out-of-state from domestic waste. Both types of waste presented identical health and pollution hazards. Under those circumstances, New Jersey was free to ban *all* wastes, to regulate *all* wastes, or to allow the unregulated disposal of *all* wastes, but it could not allow domestic wastes to be buried in its commercial landfills while prohibiting landfill operators from accepting out-of-state wastes.

The reasoning of this Court in *City of Philadelphia* is squarely applicable to the case at bar. Interstate movement of spent nuclear fuel, like interstate movement of solid or liquid wastes, is "commerce" within the meaning of the Commerce Clause. Thus, it may be regulated by Congress and may *not* be

unduly restricted by the states. Assuming *arguendo* that a state has the power to regulate spent nuclear fuel at all,[6] it must do so evenhandedly. Because spent fuel discharged in California or Wisconsin is identical in every respect to spent fuel discharged in Illinois, any statute that prohibits the storage or transportation of out-of-state, but not domestic, spent fuel, must be unconstitutional. This is true even if the State's only goal is to protect the public from possible hazards associated with the storage of spent fuel. As the Court held in *City of Philadelphia* v. *New Jersey*, even legitimate, non-discriminatory goals cannot be achieved by facially discriminatory means. Any other result would violate the concept of free interstate trade embodied in the Commerce Clause:

> "Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all." *Id.* at 629.

The same reasoning applies here. As the State itself recognizes, the disposal of spent nuclear fuel is a nationwide problem. The Commerce Clause cannot be interpreted to permit one state to isolate itself from that problem by declaring its storage facilities off-limits to all other states.

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[6] As the Seventh Circuit held, Congress has exercised its power to regulate spent nuclear fuel to such an extent that it has preempted the entire field. Thus, even if it did not discriminate against interstate commerce, the Spent Fuel Statute would be unconstitutional because it violates the Supremacy Clause.

B.

There Is No Reason To Disturb The Lower Courts' Finding That The Spent Fuel Statute Is Not A Quarantine Measure.

The State does not dispute the fact that the Spent Fuel Statute should be held unconstitutional if Commerce Clause principles apply. Rather, it bases its entire position on the argument that those principles do *not* apply because the Spent Fuel Statute is a quarantine measure and, as such, falls within the "quarantine exception" set forth in *Asbell* v. *Kansas*, 209 U. S. 251 (1908), and *Clason* v. *Indiana*, 306 U. S. 439 (1939). Even assuming that such an exception continues to exist, it is not applicable to the Spent Fuel Statute, which both lower courts have held is simply *not* a quarantine measure.

In *City of Philadelphia* v. *New Jersey*, this Court distinguished the quarantine cases on the ground that they involved articles whose "very movement risked contagion and other evils." By contrast, in the case before it there had been no claim that

> "the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible. The harms caused by waste are said to arise after its disposal in landfill sites, and at that point, New Jersey concedes, there is no basis to distinguish out-of-state waste." 437 U. S. at 628.

The State has attempted to take advantage of the distinction made in *City of Philadelphia* by arguing that the very movement of spent fuel presents health hazards. But both courts below rejected this argument, on the ground that the Spent Fuel Statute is clearly aimed at preventing *storage*, not transportation of out-of-state spent fuel. Supp. App. at 8-9; App. at 14a. Despite the fact that all spent fuel necessarily presents the same hazards, if any, during transportation, the Spent Fuel Statute:

(i) does not prohibit the transportation *within* the State of Illinois of spent nuclear fuel discharged in Illinois;

(ii) does not prohibit the transportation *through* Illinois of spent fuel discharged elsewhere unless it is to be stored at an away-from-reactor facility in Illinois; and

(iii) does not prohibit and, indeed, specifically allows, the importation for storage purposes of spent nuclear fuel from any states that give Illinois reciprocal storage privileges.

Thus, as the Seventh Circuit held, the Statute, unlike a legitimate "quarantine" measure, reflects a hostility to the interstate nature of the spent fuel and not to the purported hazards of the fuel itself.

The lower courts' view of the Statute should be treated by this Court as a finding of fact which should not be disturbed absent a "very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949); *United States* v. *Ceccolini*, 435 U. S. 268 (1978). No such showing has been made here.

C.

The Court of Appeals Decision Is Consistent With Decisions In Other Circuits.

Not only was the Seventh Circuit's decision in this case consistent with, and indeed mandated by, *City of Philadelphia*, it is also consistent with decisions in other similar cases in the Tenth and Ninth Circuits.

In *Hardage* v. *Atkins*, 582 F. 2d 1264 (10th Cir. 1978), the court relied on *City of Philadelphia* in striking down an Oklahoma statute which, like the Spent Fuel Statute, prohibited the importation of waste material unless the state of origin had entered into a reciprocity agreement with the State of Okla-

homa. Similarly, in *Washington State Building & Construction Trades Council* v. *Spellman*, 684 F. 2d 627 (1982), the Ninth Circuit held that the Commerce Clause was violated by a Washington statute banning the importation for purposes of storage of low-level radioactive wastes. In its opinion the court rejected a quarantine argument similar to that made here, holding that while a state may "close its borders to protect citizens against health hazards such as epidemics," it may not use its citizens' health as an excuse to isolate itself from the "nationwide problem of waste disposal." *Id.* at 631.

II.

THE PREEMPTION ISSUE RAISED IN THE PETITION IS NOT PROPERLY BEFORE THE COURT.

Because the Court of Appeals was correct in holding the Spent Fuel Statute unconstitutional under the Commerce Clause, there is no reason for this Court to consider the first argument raised in the Petition, *i.e.*, that the Court of Appeals erred in holding the Spent Fuel Statute preempted by the pervasive federal regulation of nuclear power. However, even apart from the Commerce Clause issue, the argument advanced by the State against the lower court's holding on the preemption issue does not provide a basis for granting the Petition.

The State's preemption argument rests on this Court's grant of certiorari in the case of *Pacific Gas & Electric Company* v. *State Energy Resources Conservation & Development Commission*, 659 F. 2d 903 (9th Cir. 1981). There, the Ninth Circuit upheld against a Supremacy Clause challenge a California moratorium on the certification of new nuclear plants until there is a federally approved method of nuclear waste disposal. The court held that the Atomic Energy Act, while preempting state regulation of radiological hazards, was not intended to impair a state's ability to regulate its public utilities or to address legitimate economic concerns. It then delved into the

extensive legislative history behind the California moratorium, determining that it was an economic rather than a safety measure. The court found that the legislature had been concerned that the lack of any nationwide disposal strategy created "uncertainties in the nuclear fuel cycle [which] make nuclear power an uneconomical and uncertain source of energy." 659 F. 2d at 925. California's decision to prohibit its utilities from constructing new nuclear plants until these uncertainties were resolved was held to be within the state's power to regulate in its economic interest.

Here, by contrast, until the instant Petition was filed, Illinois' Spent Fuel Statute had always been defended purely as a *safety* measure. In its opinion, the Seventh Circuit, like the Ninth Circuit in *Pacific Gas & Electric*, relied on the holding in *Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143 (8th Cir. 1971), *aff'd*, 405 U. S. 1035 (1972), that pervasive federal regulation of the nuclear power industry preempts state regulation of radiological hazards. The Seventh Circuit went on to state that

> "[t]he analysis of the structure and legislative history of the Act in *Northern States* compels the conclusion that the Act equally preempts state regulation of the storage, and shipment for storage, interstate and intrastate alike, of spent nuclear fuel." App. at 16a.

It then rejected the State's argument that the Spent Fuel Statute was a permissible state regulation of radioactive air pollution under the Clear Air Act Amendments of 1977.

In its Petition, the State does not dispute the holding of both the Seventh and Ninth Circuits that state safety regulations aimed at radiological hazards are preempted.[7] Rather, it

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[7] Numerous cases have held that federal regulation of radiological hazards pursuant to the Atomic Energy Act is so pervasive that it preempts any state regulation in this area. See, *e. g.*, *Northern States Power Co.*, v. *Minnesota*, 447 F. 2d 1143 (8th Cir. 1971), *aff'd*,

(Footnote continued on following page)

argues that the Seventh Circuit should have viewed the Illinois Statute, like the Ninth Circuit viewed the California moratorium in *Pacific Gas & Electric*, as having been motivated by strictly economic concerns. The State contends that the ban on the storage of out-of-state spent fuel was designed solely to ensure that the capacity of the Morris facility would not be exhausted in the very near future. It hypothesizes that once the storage pools are full, General Electric will no longer have an economic incentive to maintain the facility and "will likely abandon it," leaving the state to bear the cost of caring for the facility. Petition at 7. The State chastises the Court of Appeals for "ignor[ing]" the true purpose of the Statute and argues that its erroneous interpretation puts the Seventh Circuit in conflict with the Ninth. There are a number of reasons why this argument must be rejected.

First, the courts below can hardly be faulted for not adopting the State's current view of the Statute's purpose, since it is an entirely new argument raised for the first time in this Court. As both of the opinions below demonstrate, the State in its arguments to the lower courts concentrated exclusively on the hazards associated with radiation allegedly emitted by the spent fuel. Thus, its sole argument on the preemption issue in the Court of Appeals was as follows:

> "The State has alleged, and for purposes of this appeal it must be taken as true, that the transportation of spent nuclear fuel into Illinois would generate possibly dan-

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(Footnote continued from preceding page)

405 U. S. 1035 (1972); *Train* v. *Colorado Pub. Int. Research Group, Inc.*, 426 U. S. 1, 15-17 (1976). The transportation, storage, and disposal of spent fuel are comprehensively regulated by the NRC and thus fall within the category of activities the states are prohibited from regulating. The design, siting, licensing and operation of away-from-reactor facilities are all regulated under 10 C. F. R. Part 72; the packaging and transportation of special nuclear material including spent fuel is governed by 10 C. F. R. Part 71.

gerous amounts of radioactive air pollution. The Spent Fuel Act, by prohibiting the introduction of this pollution source, is thus a state regulation of radioactive air pollution authorized by the Clean Air Amendments." State's Opening Brief at 57; see also Reply Brief at 27.

It is well settled that this Court will not review issues that the Petitioner failed to raise below. See *Tacon* v. *Arizona*, 410 U. S. 351 (1973) (dismissing writ as improvidently granted where the issues on which the grant was based had not been raised below or passed upon by the court below); *Hill* v. *California*, 401 U. S. 797, 805 (1971). That rule necessarily precludes consideration of the State's newly presented argument in this case.

One of the major reasons for refusing to review issues not raised below is the lack of a proper record on the new issue. In this case there is simply no basis in the record for the essential factual predicates of the new argument. Furthermore, the suggestion that General Electric is likely to abandon Morris once it reaches capacity because it will become uneconomical to maintain simply has no basis in fact. All fuel stored at Morris is stored there on a temporary basis and most of the utilities that own the fuel compensate General Electric for the privilege of keeping it there. In addition, as a General Electric representative testified in legislative hearings, "[f]uel storage facilities are very expensive and benefit greatly from the economies of scale." (Statement of Dr. Bertram Wolfe before the House Committee on Environment Energy and Natural Resources, June 7, 1979). That is, in a larger storage facility, the fixed costs can be more effectively spread among the users. Thus, General Electric's economic position will be enhanced, not harmed, by the utilization of Morris' full capacity. It should also be noted that the NRC's regulations require licensees to make elaborate provisions for decommissioning away-from-reactor facilities. 10 C. F. R. §§ 72.18, 72.31(a)(10), 72.38, 72.76.

There is also no basis in the legislative history for ascribing to the Illinois legislature any fear that the facility would be abandoned, or any hope that a limitation on its capacity would forestall abandonment. Indeed, there is not even a *mention* of the possibility that the Morris facility was in danger of abandonment in any of the debates that have been transcribed. There is, however, ample legislative history, which the State quoted in the Court of Appeals, demonstrating the legislature's concern with the alleged radiation hazards associated with spent fuel.[8]

Second, the Seventh Circuit's view of the law simply does not conflict with the view expressed by the Ninth Circuit in *Pacific Gas & Electric.* Because it treated the Statute as an attempt to regulate radiological hazards, the Seventh Circuit found it unnecessary even to reach the issue of a state's power to regulate for economic purposes, which was the keystone of the court's analysis in *Pacific Gas & Electric.* The lack of any real conflict between the two Circuits is also confirmed by the Ninth Circuit's subsequent opinion in *Washington State Building & Construction Trades Council* v. *Spellman, supra,* 684 F. 2d at 630, where the court held that Washington's attempt to prohibit the importation for storage purposes of low-level radioactive wastes was preempted by the Atomic Energy Act.

Third, and finally, the interrelation between the State's Commerce Clause and preemption arguments is such that the Statute must be considered invalid on one theory or the other. If the Statute is based on economic motives, as the State argues in Part I of its Petition, then it cannot be considered a quarantine measure designed to protect the citizens of Illinois

[8] For example, one senator, in a remark quoted by the State, urged an override of the Governor's veto on the ground that "the citizens of this State [should not] be subjected to the risk of radiation that's been generated in other states. . . ."

from radiation hazards. But without the quarantine exception, even the State concedes that the Statute must be held unconstitutional under the Commerce Clause.[9]

If, on the other hand, the State's argument in Part II of the Petition is correct and the Spent Fuel Statute *is* a quarantine measure designed to protect the citizens of Illinois against radiation hazards, then it cannot fall within the category of "economic" measures carved out by the court in *Pacific Gas & Electric*. Rather, it must be considered a "safety" regulation, which both the Seventh and Ninth Circuits agree is preempted by the pervasive federal regulation of radiological hazards.

III.

THE TENTH AMENDMENT ARGUMENT IS FRIVOLOUS AND SHOULD NOT BE CONSIDERED BY THIS COURT.

In Part I-B of its Petition, the State argues that if the Atomic Energy Act was intended to preempt measures like the Spent Fuel Statute, then it interferes with each state's right to control its treasury in violation of the Tenth Amendment. Like the State's preemption argument, this argument is also predicated on the erroneous assumption that the Spent Fuel Statute is an economic measure. Furthermore, like the preemption argument, the Tenth Amendment claim was not raised or passed on in the courts below, and therefore should not be considered by this Court.

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[9] This is particularly true if the goal was simply to limit the amount of fuel being added to the Morris facility, since that goal could easily have been accomplished by limiting the number of tons to be added without regard to where that tonnage was generated. Where a state chooses the most, rather than the least discriminatory means of accomplishing its goal, it clearly trangresses the limitations imposed by the Commerce Clause. *Hughes* v. *Oklahoma*, 441 U. S. 322, 337 (1979).

In any event, the Tenth Amendment claim is frivolous in light of this Court's decision in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U. S. 264 (1981). At issue in *Hodel* was the constitutionality of a federal statute regulating strip-mining which explicitly preempted state regulation unless it met certain conditions. It was argued that the statute was unconstitutional because, among other things, it invaded powers reserved to the states under the Tenth Amendment. This Court rejected that argument, holding that its decision in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), on which the State relies in this case, could not be extended to cases where federal statutes interfere with, or even totally preempt, the exercise of traditional state functions such as land-use planning. The Court, in effect, limited *National League of Cities* to its facts, holding that the Tenth Amendment prohibits only direct federal regulation of *state* activities and does not "shield [ ] the States from pre-emptive federal regulation of *private* activities affecting interstate commerce." 452 U. S. at 291 (emphasis in original).

Hodel disposes of the State's contention here that the Tenth Amendment prohibits Congress from preempting state regulation of nuclear wastes if that regulation has an indirect impact on state treasuries. Unlike the federal statute at issue in *National League of Cities*, the Atomic Energy Act does not order the states to make particular expenditures, nor does it purport to regulate states in their *governmental* capacities; rather, like the strip-mining statute in *Hodel*, the Atomic Energy Act regulates only *private* conduct—in this case the private use of nuclear energy. The fact that this regulation of private conduct may indirectly require some state spending clearly does not render the federal regulation unconstitutional under the Tenth Amendment.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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EXHIBIT A

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